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FEB 27 1997

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February 27, 1997

William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

Dear Mr. Caton

On behalf of Heftel Broadcasting Corporation, there are herewith submitted an original and four (4) copies of its Comments in response to the Opposition to Petition for Rulemaking filed by Jerry Snyder and Associates, Inc. on February 5, 1997, with regard to Heftel's previously-filed Petition for Rulemaking relating to the FM Table of Allotments in Gainesville, Lewisville, Corsicana, Robinson, Jacksboro, and Mineral Wells, Texas.

Please direct any inquiries regarding this filing to the undersigned counsel.

Sincerely

  
Lawrence N. Cohn

Enclosures

cc: Robert W. Healy, Esq. (w/encl.)  
John A. Karousos (w/encl. - FCC, Room 8322)  
Pamela Blumenthal, Esq. (w/encl. - FCC, Room 8308)  
Larry D. Eads, (w/encl. - FCC, Room 302)

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FEB 27 1997

Federal Communications Commission  
Office of Secretary

BEFORE THE

# Federal Communications Commission

In the Matter of )  
 )  
Amendment of Section 73.202(b), ) MM Docket No.  
Table of Allotments, ) RM No.  
FM Broadcast Stations. )  
 )  
Gainesville, Lewisville, Corsicana, )  
Robinson, Jacksboro and )  
Mineral Wells, Texas )  
  
To: Chief, Mass Media Bureau

## COMMENTS OF HEFTEL BROADCASTING CORPORATION

Heftel Broadcasting Corporation ("Heftel"), parent of the licensee of Station KICI-FM, Corsicana, Texas, and of the permittee of Station KECS(FM), Gainesville, Texas, by its counsel, hereby submits these Comments in response to the Opposition to Petition for Rulemaking ("Opposition") filed with the Commission in the above-referenced matter by Jerry Snyder and Associates, Inc. ("Snyder"), licensee of Station KYXS-FM, Mineral Wells, Texas, on February 5, 1997.<sup>1/</sup>

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<sup>1/</sup> Snyder served a copy of its Opposition on the law firm of Haley Bader & Potts, which was Heftel's communications counsel prior to the transfer of control of Heftel to Clear Channel Communications, Inc. (which is represented by the law firm of Wiley Rein & Fielding). Subsequently, control of Heftel was transferred to the Tichenor Family Voting Agreement Shareholders, which is represented by the undersigned firm. Because of the two changes in counsel representing Heftel, the undersigned firm became aware of the Opposition only last

Heftel filed a petition for rulemaking regarding the FM Table of Allotments in Gainesville, Lewisville, Corsicana, Robinson, Jacksboro, and Mineral Wells, Texas, on July 26, 1996. Snyder opposes issuance of the requested notice of proposed rulemaking insofar as it would downgrade the allocation for Station KYXS-FM at Mineral Wells, Texas, from Channel 240 C1 to Channel 240 C3. According to Snyder, Heftel's rulemaking proposal regarding the Mineral Wells allocation should not be considered by the Commission because (1) Snyder has not lost interest in the use of Channel C1 at Mineral Wells, and (2) Snyder filed a construction permit upgrade application for Channel 240 C1 with the Commission on November 25, 1996.

Snyder's position is wrong as a matter of law. Snyder apparently believes that because the Commission upgraded the Mineral Wells allotment from Channel 240 C3 to 240 C1 in 1992,<sup>2/</sup> the construction permit application which it filed in November 1996, is exempt from evaluation under existing Commission precedent in conjunction with the use of the Mineral Wells allotment as proposed in Heftel's previously-filed petition for rulemaking. However, the issue of whether a "minor change" construction permit application

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week, and has prepared and filed these Comments as expeditiously as possible.

<sup>2/</sup> See, Table of Allotments, Mineral Wells and Winters, Texas, 7 FCC Rcd 1791 (Chief, Allocations Branch).

such as the one filed by Snyder takes priority over a conflicting proposal made in a previously-filed petition for rulemaking has been squarely addressed by the Commission and has been decided adversely to Snyder. See, Report and Order re: Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments (MM Docket No. 91-348), 7 FCC Rcd 4917 (1992) (subsequent history omitted) ("1992 Report and Order"), where the Commission wrote (at p. 4919) as follows:

After reexamining the cut-off rule proposed in our Notice and considering the commenters' proposals, we are of the view that FM applications should receive protection from conflicting rulemaking proposals at the same time that they receive such protection from other mutually exclusive applications. Under this approach, applications for new stations or for major changes in the nonreserved FM band filed during a filing window will be protected from rulemaking petitions at the close of the filing window. Likewise, applications for new FM stations or major changes in the reserved, noncommercial band will be protected at the end of the 30-day period for filing mutually exclusive applications as established in periodically released Commission Public Notices. All other FM applications -- including all minor change applications in either the reserved or nonreserved band and "first come, first served" applications for new FM stations or major changes in the nonreserved band filed after the close of a filing window -- will be protected from conflicting rulemaking proposals on the date they are received at the Commission. (footnotes omitted) (emphasis supplied)

This principle is now embodied in Section 73.208(a)(3)(iii) of the Commission's Rules. Accordingly, Snyder's minor change application

to use Channel 240 C1 at Mineral Wells, which was not filed until November 1996, must be considered along with Heftel's proposal to downgrade the Mineral Wells allotment to Channel 240 C3 because Heftel's rulemaking petition was filed four months before Snyder filed its construction permit application.

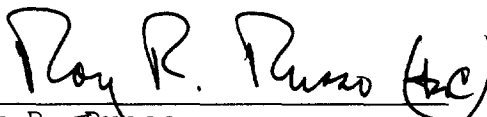
Moreover, sound public policy requires the rejection of Snyder's position. Snyder filed an application to upgrade KYXS-FM to Channel 240 C1 and the Commission granted the application (see, BALH-920925ID, granted April 13, 1993). However, Snyder did not improve its station as authorized by the Commission, it did not seek an extension of the permit, and the Commission cancelled its permit on December 13, 1994. Snyder was on notice of the Commission's 1992 Report and Order placing rulemaking requests on the same footing as applications to modify station facilities. Since Snyder was on notice of the 1992 Report and Order but yet did not take advantage of its "right" to modify Station KYXS-FM to operate on Channel 240 C1 for 20 months (i.e., from April 1993 to December 1994), it has no legitimate claim of "surprise" that its current interest in using Channel 240 C1 will be compared with the conflicting proposal advanced by Heftel after Snyder's permit was cancelled by the Commission. Furthermore, since Snyder did not modify Station KYXS-FM in reliance on the Commission's substitution of Channel 240 C1 for Channel 240 C3, Snyder has no special

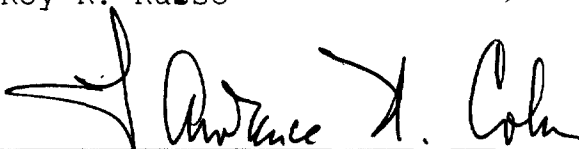
equities on its side in the weighing of the benefits which would flow from Snyder's proposed use of Channel 240 C1 at Mineral Wells against the countervailing public interest benefits which would result from the channel allocation plan advanced by Heftel and which is currently under consideration by the Commission.

Respectfully submitted

HEFTEL BROADCASTING CORPORATION

By:

  
Roy R. Russo

  
Lawrence N. Cohn

Date: February 27, 1997

**CERTIFICATE OF SERVICE**

I, Lula Parker, a secretary in the Law Firm of Cohn and Marks, hereby certify that I have, this 27th day of February, 1997, caused to be delivered by First Class U.S. mail, postage pre-paid, or by hand, as indicated, the foregoing "COMMENTS OF HEFTEL BROADCASTING CORPORATION" as follows:

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